Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78- 78-356

SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA,
Petitioner,

v.

LES LICKLIDER, Chairman, Iowa State Conservation Commission; THOMAS A. BATES; JIM D. BIXTER; JOHN G. LINK; CAROLYN T. LUMBARD; HERBERT T. REED; and JOHN THOMPSON, members of the State Conservation Commission; FRED A. PRIEWART, Executive Director, State Conservation Commission; and KENNETH KAKAC, Superintendent of Law Enforcement, Hunting and Fishing,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Sac and Fox Tribe of the Mississippi in Iowa (the Tribe) petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court is not reported; that of the Court of Appeals is reported at 576 F.2d 145 (8th Cir. 1978). Both are reproduced in the appendix to this petition.

JURISDICTION

The decision of the Court of Appeals was entered on May 12, 1978. The Tribe filed a timely petition for rehearing on May 26, 1978, which was denied on June 7, 1978. The Tribe invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Has Congress conferred jurisdiction on the State of Iowa to regulate Indian hunting and fishing within the Sac and Fox Indian Reservation?

STATUTES INVOLVED

The following statutes are involved in this case and are more fully set out in the appendix:

1. Act of the Fifth Extra Iowa General Assembly ch. 30, July 15, 1856.
2. Act of the Twenty-Sixth Iowa General Assembly, ch. 110, February 14, 1896.
3. Act of June 10, 1896, ch. 398, 29 Stat. 321, 331.
4. Act of June 30, 1948, ch. 759, 62 Stat. 1161.

STATEMENT OF THE CASE

The Sac and Fox Tribe of the Mississippi in Iowa brought this action against state officials seeking a determination whether the State of Iowa can regulate Indian hunting and fishing on the Sac and Fox Reservation in Tama County, Iowa. The United States filed a similar action, and the two were consolidated. The District Court held that two federal statutes [1] authorized state regulation (*see* page 5a below); the Court

[1] Act of June 10, 1896, ch. 398, 29 Stat. 321, 331; Act of June 30, 1948, ch. 759, 62 Stat. 1161. (*See* page 25a below).

of Appeals affirmed on the same ground (*see* pages 18a, 19a below).

Before considering the two federal statutes relied on by the courts below, it is necessary to trace briefly the background of the Reservation and the relationship between the United States and the Sac and Fox Indians. These are discussed in some detail in Part I of the Court of Appeals' decision, set out below at pages 8a-12a, and need not be completely restated here. The relevant and significant points should, however, be summarized.

The Sac and Fox Tribes [2] were repeatedly forced to move west and south from their aboriginal lands by the expansion of the United States. Their assent to these moves was embodied in the extraordinary number of nineteen treaties with the United States. An 1825 treaty [3] expressly recognized their occupancy right to a large part of Iowa including the present Reservation. In an 1842 treaty [4] the tribes agreed to cede all Iowa lands and remove to Kansas by 1845.

A number of tribesmen (mostly Fox) were opposed to the 1842 treaty. Some refused to leave and remained in Iowa; others returned from Kansas. In the 1850's Iowa citizens petitioned the State government to allow them to remain in Iowa. In response the Iowa Legis-

[2] Historically these were two separate tribes. In the late 18th century the Fox were reduced in number by wars with the French and formed a loose confederation with the Sac. The United States has mostly dealt with the confederated tribes. *See* pages 1a, 9a-10a below.

[3] Treaty of August 19, 1825, 7 Stat. 272.

[4] Treaty of October 11, 1842, 7 Stat. 596.

lature in 1856 enacted a statute[5] which gave the consent of the state "that the Indians now residing in Tama County known as a portion of the Sacs and Foxes, be permitted to remain and reside in said state ...." The Indians purchased 80 acres of land, and title was taken in the name of the Governor of Iowa in trust for the Tribe. Over the next forty years, the Tribe purchased additional lands to bring the total to about 3,000 acres. Trust title to about 2,720 acres was in the Governor of Iowa; trust title to 280 acres was in the federal Indian agent.

In 1865 the United States sent an Indian agent to supervise the Indians in Tama County. In 1867 the Sac and Fox Tribes entered into another treaty ceding their Kansas lands and agreeing to remove to Oklahoma, but the treaty expressly excepted those in Iowa.[6] A statute passed the same year assented to the Iowa Indians being paid their treaty annuities in Iowa.[7]

From 1865 until the present, the Tama County, Iowa, lands of the Sac and Fox Tribe have been for the most part treated like any other Indian reservation. The lands are occupied and used communally by the Tribe under federal supervision.[8] The federal government has assumed the usual supervisory obligations: land

[5] Act of the Sixth Iowa General Assembly, ch. 30, July 15, 1856, set out at p. 22a below.

[6] Treaty of February 18, 1867, 15 Stat. 495, art. 21.

[7] Act of March 2, 1867, ch. 173, 14 Stat. 492, 507.

[8] *See* United States v. John, 46 U.S.L.W. 4806 (June 23, 1978). The Tribe's lands, even when held by the State of Iowa in trust for the Tribe, could not have been alienated without the consent of the United States. 25 U.S.C. § 177.

management, health and education funding, and the like. In 1937, the Tribe organized a tribal government pursuant to the Indian Reorganization Act, 25 U.S.C. § 476.

The present case depends on two federal statutes passed in 1896 and 1948 which allocated certain kinds of criminal law jurisdiction to the State of Iowa. Although neither statute refers to hunting and fishing, nor does the legislative history of either, the courts below held that they authorize state regulation of Indian hunting and fishing within the Reservation. Because these statutes and the circumstances of their enactment are the matters at issue, they are discussed in the following sections of this petition.

The reasons for granting the writ in this case are that the courts below have interpreted federal laws in a manner fundamentally at odds with the very nature of an Indian reservation and contrary to prior decisions of this Court. From the beginning a basic purpose implicit in the concept of an Indian reservation was Indian use of the land reserved for their subsistence and self-support. Subsistence hunting, fishing and gathering for food, clothing and spiritual and other uses are manifestly at the heart of such purposes. These principles have been recognized in numerous court decisions, *e.g.*, *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *United States* v. *Shoshone Tribe*, 304 U.S. 111 (1938); *United States* v. *Winters*, 207 U.S. 564 (1908). No prior decision anywhere sustains state prohibition of subsistence Indian hunting and fishing within reservations.

In other situations where (as here) tribes agreed to remove from an area, but the removal was later par-

tially rescinded, the courts have found that hunting and fishing rights survived. *State* v. *Gurnoe,* 53 Wis. 2d 390, 192 N.W.2d 892 (1972); *People* v. *Leblanc,* 399 Mich. 31, 248 N.W.2d 199 (1976).

Modern state regulation of hunting and fishing, primarily geared to sportsmen, is conceptually incompatible with Indian subsistence harvesting, so that state regulation of reservation Indians is generally condemned.[9] State hunting and fishing seasons prohibit subsistence taking during most of the year and thus almost entirely negate the essential Indian use.

A. The 1896 Statute Did Not Confer Hunting and Fishing Jurisdiction on Iowa.

In 1896 the Iowa Legislature offered to transfer to the United States trust ownership of the Sac and Fox lands then held by the Governor of Iowa.[10] The tender to the United States offered "exclusive jurisdiction" to the United States but excepted certain forms of jurisdiction over the Reservation including "crimes against the laws of Iowa committed thereon . . . by said Indians." Congress accepted the transfer with its conditions.[11] The courts below held that this statute conferred hunting and fishing regulatory control on the State. This was clearly in error for the reasons following.

Between 1899-1901, the federal district court for the Northern District of Iowa issued four decisions con-

[9] State v. Tinno, 94 Ida. 759, 497 P.2d 1386, 1392 (1972); F. Cohen, Handbook of Federal Indian Law (GPO 1942) p. 286.

[10] Act of the Twenty-Sixth Iowa General Assembly, ch. 110, February 14, 1896 (*see* page 23a).

[11] Act of June 10, 1896, ch. 398, 29 Stat. 321, 331 (*see* page 25a).

cerning one series of events: efforts to force Indian children to attend school.[12] One of the issues in these cases was whether Indian adults who kept the children out could be prosecuted in state court for violation of the Iowa compulsory school attendance laws. The court held that they could not be prosecuted because the 1896 statute did not give Iowa such jurisdiction. *Peters* v. *Malin,* 111 F. at 255 (N.D. Iowa 1901). The court also held that the tribe and its lands had been under federal supervision and control prior to 1896, so that Iowa had nothing to reserve, and that the purported exception as applied would be fundamentally inconsistent with the grant. 111 F. at 250-56.

The court below purported to distinguish *Peters* v. *Malin* by arguing that compulsory school laws interfere with "the affairs of the tribal Indians in their relation to each other," but hunting and fishing laws do not. See page 19a below. This distinction is not rational. Subsistence use of Indian lands is at least as much an internal matter as requiring Indians to attend school. There is no compelling state interest in game regulation until the State shows that actual Indian practices create conservation problems outside the Indian lands. *See Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 (1968). There was no such showing or finding in this case.

A further problem with the reasoning below is that it is clear that both the State and Congress understood the decision in *Peters* v. *Malin, supra,* to place the Reservation under federal jurisdiction rather than State,

[12] In re Lelah-Puc-Ka-Chee, 98 F. 429 (N.D. Iowa 1899); Peters v. Malin, 104 F. 849 (N.D. Iowa 1900); Y-Ta-Tah-Wah v. Rebock, 105 F. 257 (N.D. Iowa 1900); Peters v. Malin, 111 F. 244 (N.D. Iowa 1901).

notwithstanding the 1896 statute. Otherwise the 1948 statute, discussed below, would have been redundant. Congress expressly recognized this in the legislative history of the 1948 Act, which was ignored by the courts below. *See* House Report No. 2356, 80th Cong., 2d Sess. (1948).

In the somewhat different context of state jurisdictional cessions to the federal government for other purposes, this Court has recognized that an exception retaining general state criminal jurisdiction does not include regulatory authority. *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) (liquor regulation).

B. The 1948 Statute Did Not Confer Hunting and Fishing Jurisdiction on Iowa.

The 1948 statute[13] conferred on Iowa jurisdiction over "offenses committed by or against Indians on the Sac and Fox Indian Reservation" but excepted jurisdiction over offenses "defined by the laws of the United States committed by or against Indians on Indian reservations." *Youngbear* v. *Brewer*, 549 F.2d 74 (8th Cir. 1977). The courts below held that this statute also confers jurisdiction on Iowa over Indian hunting and fishing on the Reservation. This was clear error for the following reasons.

Many of the same reasons set out above are again applicable. Hunting and fishing is not mentioned in the statute or any legislative history, and is primarily regulatory rather than criminal. In *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), this Court held that 25 U.S.C. § 899, which stated that *all* federal Indian laws were withdrawn from the Menominee Tribe,

[13] Act of June 30, 1948, ch. 259, 62 Stat. 1161, *see* page 25a.

was insufficient to permit state jurisdiction over Indian hunting and fishing on a *former* reservation. The much more modest scope of the 1948 Sac and Fox statute cannot reasonably be said to do more. *See also Kimball* v. *Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1975).

A further problem with the decision below is that it produces an absurd result. The retained federal jurisdiction under the proviso to the 1948 statute includes jurisdiction to prosecute non-Indians who violate the Indian lands for hunting and fishing. 18 U.S.C. §§ 1165, 1164; *Youngbear* v. *Brewer, supra.* Thus the court's decision supports federal jurisdiction over non-Indian hunting and fishing but state jurisdiction over the Indians.

The interpretation below of the 1948 statute is also inconsistent with the Indian Reorganization Act Constitution granted the Tribe in 1937, which expressly commits to tribal authority the protection of tribal resources. *See* R. Tribe's Exh. 2. The right to use tribal lands for self-support is obviously the most basic of such resources.

CONCLUSION

If a statute is to abrogate basic Indian rights and immunities, it must do so in clear, unambiguous language. *Bryan* v. *Itasca County,* 426 U.S. 373, 392 (1976). Neither statute relied on below satisfies that test, and subsistence use of land is the most fundamental attribute of an Indian reservation. For these reasons this Court is requested to grant this petition and to reverse the decision below.

Respectfully submitted,

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August 1978

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

No. C 74-30

SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA, *Plaintiff*,

vs.

LES LICKLIDER, *et al.*, *Defendants*.

No. C 75-42

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

STATE OF IOWA, *Defendant*.

(FILED MAY 6, 1977)

Findings of Fact, Conclusions of Law and Order

These consolidated actions for declaratory relief are before the court for final decision following oral hearing January 10, 1977.

FINDINGS OF FACT

1. Plaintiffs are the American Indian Sac and Fox Tribe of the Mississippi in Iowa (Tribe)[1] and its guardian the United States of America.

2. Defendants are the State of Iowa, the State Conservation Commission and the Commission's Superintendent of Law Enforcement.

3. The Tribe occupies an approximately 3000 acre tract of land in Tama County, Iowa (Tract) which is held

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[1] Traditionally the government has characterized the Sac (Sauk) and Fox (Mesquakie) as a confederated tribe.

in trust by the United States for the use and benefit of the Tribe.

4. Prior to the year 1700 and dating from time immemorial the Sac and Fox Tribes were distinct separate tribes. However, as a result of war between the Foxes and the French in the early 18th Century, the Fox Indians were reduced in number and joined the Sacs in a confederacy. By the middle of the 18th Century, the Sac and Fox Indians had established villages in Iowa and Illinois along the Mississippi River and hunted, fished and trapped along the entirety of the Skunk, Cedar, Des Moines and Iowa Rivers.

5. In conjunction with the Ioway Tribe, the Tribe had exclusive aboriginal domain over what is commonly referred to as Royce Area 262 which includes the Tract.

6. Prior to the Treaty of October 11, 1842, 7 Stat. 596, the Tribe hunted and trapped in Royce Area 262 and west of Royce Area 262 to the Missouri River and beyond for sustenance and trade purposes.

7. By the Treaty of 1842 the Tribe ceded to the United States forever, all the lands west of the Mississippi River, to which they have any claim or title, or in which they have any interest whatever (including the Tract), and removed to Kansas in exchange for payment of annuities.[2] Hunting,

[2] . . . Article I. Treaty of 1842, 7 STAT. 596:

The confederated tribes of Sacs and Foxes cede to the United States forever, all the lands west of the Mississippi river, to which they have any claim or title, or in which they have any interest whatever; reserving a right to occupy for the term of three years from the time of signing this treaty, all that part of the land hereby ceded which lies west of a line running due north and south from the painted or red rocks on the White Breast fork of the Des Moines river, which rocks will be found about eight miles, when reduced to a straight line, from the junction of the White Breast with the Des Moines.

fishing and trapping rights were not reserved. Many members of the Tribe formally opposed the treaty and later returned to Iowa from Kansas.

8. In the period from 1852 to 1856, private individuals and officials of the State of Iowa assisted members of the Tribe who wished to reside in Iowa.

9. By the Act of July 15, 1856, the State of Iowa gave its consent for the Tribe then residing in Tama County to remain and reside there and directing the Governor to so inform the Secretary of War and urge payment of their annuities in Iowa. The United States agreed thereto, Act of March 2, 1867, 14 STAT. 492, 507.

10. After 1857, the traditional hunting, fishing and trapping practices of members of the Tribe continued through the end of the 19th Century, with members of the Tribe leaving their land near Tama to spend the winter hunting and trapping along the various river valleys and in the spring returning to plant their crops.

11. The Department of the Interior appointed Leander Clark as special Indian Agent for the Tribe in August, 1865, and established a special agency for the Tribe, which continues to the present date.[3]

12. Between 1856 and 1896, the approximately 3,000 acres of land was purchased in Tama County for the benefit of the Tribe. The Governor of Iowa, prior to 1896, purchased 2,720 acres of land in trust for the benefit of the Tribe, including the first 80 acres in 1857. The Indian

[3] From at least 1874, the Bureau of Indian Affairs has expended money for the education of members of the Tribe, including the construction of a boarding school in Toledo, Iowa, in 1897 and construction of an elementary school on the tract in 1938. Since 1897, the Bureau of Indian Affairs has also expended funds for the Tribe and its members, including social services, land management, employment assistance, health services, including water and sanitation, and police services.

Agent took title as grantee of 280 acres of land as trustee for the benefit of the Tribe. Money for the purchase of said land was obtained by the Tribe or its members from the sale of horses, the sale of pelts, charitable contributions, or treaty annuities paid by the United States.

13. All the land purchased for the benefit of the Tribe prior to 1896 was held by the Governor of Iowa or the Indian Agent as trustee for the use and benefit of the Tribe.

14. In 1896 an act of the Iowa legislature tendered exclusive jurisdiction and title to the Tract to the United States,[4] adding in § 3 thereof that "nothing in this act shall be construed to prevent [Iowa] courts from exercising jurisdiction of crimes against the laws of Iowa committed" on tribal lands. The federal government accepted and assumed jurisdiction over the Tribe and its lands pursuant to the act of the Iowa legislature and "subject to the limitations therein contained".[5] Pursuant thereto on July 3, 1908 the Governor of Iowa executed a deed of the Tract to the Secretary of the Interior of the United States. *See* Deed Record No. 135, Tama Co., Iowa p. 321.

15. Defendants have enforced Iowa fish and game laws against members of the Tribe on the Tract since as early as the 1930's. Violations can result in $100 fine and 30 days in jail and civil damages, §§ 109.32, 109.119, 109.130. Code of Iowa (1975).

Conclusions of Law

1. The court has jurisdiction of the parties and subject matter. 28 USC §§ 1331(a); 1343; 1345; 1362; 2201; 42 USC § 1983.

[4] See Appendix A.

[5] See Appendix B.

2. Plaintiffs have failed to prove by a preponderance of the evidence that the Tribe retained hunting and fishing rights in the Tract notwithstanding the Treaty of 1842. The language of the Treaty is unequivocal and the court must conclude that such language terminated the Tribe's rights in the land. *See e.g., State* v. *Williamson,* 211 N.W.2d 182 (S.D. 1973).

3. Even though the Tract is "Indian Country" within the meaning of 18 USC § 1151, *Youngbear* v. *Brewer,* 415 F.Supp. 807 (N.D. Iowa 1976) aff'd —— F.2d —— (8th Cir. Feb. 9, 1977), plaintiffs have failed to prove by a preponderance of the evidence that such status entitles members of the Tribe to hunt, fish and trap within the Tract free of state regulation. Ch. 110 Laws of the 26th G.A., Feb. 14, 1896; Act of June 30, 1948, 62 Stat. 1161.[6]

It is therefore

Ordered

Dismissed.

May 6, 1977.

/s/ Edward J. McManus
Edward J. McManus, Chief Judge
United States District Court

[6] In *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968) the Menominee could point to specific Treaty rights and the specific hunting and fishing rights proviso of 18 USC § 1162(b).

[Caption Omitted]

(Filed May 6, 1977)

Order

This matter is before the court on plaintiff Sac and Fox Tribe's resisted motion to amend findings of fact, filed May 16, 1977 and defendants' resisted bill of costs, filed May 20, 1977.

Motion to Amend

Plaintiff Tribe seeks to have this court's May 6, 1977 findings of fact amended to include a finding of continued Mesquakie presence in Iowa in violation of the Treaty of 1842.

Although the issue was argued and briefed by both sides, the court found resolution of the continued presence issue unnecessary in deciding this matter. Whether or not Mesquakies resided in Iowa in violation of the Treaty of 1842 is of no consequence to the court's ultimate conclusion that the Sac and Fox Tribe relinquished all hunting, fishing and trapping rights by the Treaty of 1842. *See,* conclusion of law No. 2, May 6 order. The Tribe failed to show how any Mesquakie presence after 1842 could have been relevant to the controlling question of the Tribe's full relinquishment of its rights in 1842.

Taxation of Costs

[Omitted]

Edward J. McManus, Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1534
No. 77-1595

Sac and Fox Tribe of the Mississippi in Iowa, *Appellant,*
and United States

v.

Les Licklider, Chairman, State Conservation Commission; Thomas A. Bates; Jim D. Baxter; John G. Link; Carolyn T. Lumbard; Herbert T. Reed; and John Thompson, members of the State Conservation Commission; Fred A. Priewart, Executive Director, State Conservation Commission; and Kenneth Kakac, Superintendent of Law Enforcement, Hunting and Fishing,

Appellees.

Appeal from the United States District Court for the Northern District of Iowa

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Submitted: February 15, 1978

Filed: May 12, 1978

Before Gibson, Chief Judge Stephenson, Circuit Judge, and Becker,* Senior District Judge.

Stephenson, Circuit Judge.

This case presents the question of whether the state of Iowa has jurisdiction to regulate hunting, fishing and trapping by members of the Sac and Fox Tribe of the Mississippi in Iowa (Tribe) on a tract of land in Tama County, Iowa, occupied by the Tribe.

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* The Honorable William H. Becker, Senior United States District Judge for the Western District of Missouri, sitting by designation.

The Tribe presently resides on a 3,000 acre tract of land in Tama County, Iowa, which is held in trust by the United States for the use and benefit of the Tribe. In response to recent arrests of Tribe members by Iowa officials for violation of Iowa fish and game laws, the Tribe brought this action below. The United States brought a similar action and the two cases were consolidated. In essence, the plaintiffs sought declaratory and injunctive relief to the effect that Iowa has no jurisdiction to regulate hunting, fishing and trapping by Tribe members on the tract of land occupied by the Tribe. The cases were considered by the district court [1] on agreed-to stipulations of fact with the single exception as to whether some Sac and Fox Indians remained in Iowa between the years 1845 and 1856. The district court, on May 6, 1977, concluded that Iowa had jurisdiction to regulate hunting, fishing and trapping on the Tama tract and accordingly dismissed the consolidated actions. These appeals by the Tribe and the United States followed.

I.

We begin with the recognized principle that: "Federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored." *United States v. Erickson,* 478 F.2d 684, 686 (8th Cir. 1973), *quoting from* F. Cohen, Handbook of Federal Indian Law, XIII (Introduction by N. Margold) (1942). Prior to the year 1700 Sac and Fox Tribes were distinct separate tribes residing in what is now central Wisconsin. As a result of war between the Fox and the French in the early 18th Century, the Fox were reduced in number and formed a loose confederation with the Sac. By 1800 the Sac and Fox had established villages along the Mississippi River in what is now Iowa and Illinois. Hunting, fishing and trapping took them as far west as central Iowa.

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[1] The Honorable Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa.

The Sac were first recognized by the United States in the Treaty of Jan. 9, 1789, 7 Stat. 28, 31 (1846), when the United States received the Sac into its friendship and protection. The Sac and Fox were jointly recognized in the Treaty of Nov. 3, 1804, 7 Stat. 84 (1846), in which much of what later became Illinois, Wisconsin and Missouri was ceded to the United States in exchange for certain payments and guarantees. In a series of treaties from 1804 through 1842, the Sac and Fox ceded other portions of their lands to the United States in exchange for payments, annuities and services.

In 1842 the Sac and Fox Tribe ceded all its land west of the Mississippi River (which includes the present Tama tract in Iowa to the United States and agreed to move to a reservation located in what is now the state of Kansas. The move was to be accomplished within three years after the treaty date.[2] Many members of the Fox Tribe and some members of the Sac Tribe who agreed to move to the reservation in Kansas pursuant to the 1842 treaty became dissatisfied with the Kansas reservation and returned to Iowa.[3]

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[2] The Treaty of Oct. 11, 1842, 7 Stat. 596 (1846), provides in part:

> The confederated tribes of Saes and Foxes cede to the United States, forever, all the lands west of the Mississippi river, to which they have any claim or title, or in which they have any interest whatever; reserving a right to occupy for the term of three years from the time of signing this treaty, all that part of the land hereby ceded which lies west of a line running due north and south from the painted or red rocks on the White Breast fork of the Des Moines river, which rocks will be found about eight miles, when reduced to a straight line, from the junction of the White Breast with the Des Moines.

[3] As noted earlier, the only factual issue in the instant case was whether some Sac and Fox Indians remained in Iowa between 1845 and 1856. Although the district court found the resolution of this issue unnecessary to its decision of the instant case, an

In 1856 the Iowa legislature consented to the continued residence of the Sac and Fox then in Iowa and urged the United States to pay these Indians their proportionate annuities under the various treaties with the Sac and Fox Tribe. 1854-1857 Iowa Laws ch. 30 (5th Extra Gen. Assembly). The Tribe purchased a small tract of land in 1857 and title was taken by the governor of Iowa in trust for the Indians.

In 1865 the federal government sent an Indian agent to Iowa to supervise the Tribe. In 1867 Congress approved the payment of the 1842 treaty annuities to the Tribe in Iowa "so long as they are peaceful and have the assent of the government of Iowa to reside in that State." Act of Mar. 2, 1867, ch. 173, 14 Stat. 492, 507 (1868). Additionally in 1867 another treaty was negotiated with the Sac and Fox Tribe which required each absent member to move onto the reservation in the Indian Territory or lose his right to funds arising under all treaties with the Sac and Fox. The Tribe in Iowa was specifically exempted from this requirement. Treaty of Oct. 14, 1868, 15 Stat. 495, 504 (1869).

Between 1856 and 1896,[4] the Tribe acquired more land in Tama County with funds generated through the sale of pelts and horses, charitable contributions, and treaty annuities. By 1896, the governor of Iowa held the title to 2,720 acres of land in trust for the benefit of the Tribe. The

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earlier decision had held that some scattered remnants had not gone to the new reservation in Kansas but had remained in Iowa following the 1842 treaty. *See In re Lelah-Puc-Ka-Chee*, 98 F. 429, 431 (N.D. Iowa 1899). It is clear that by 1856 some Sac and Fox were occuping land in Tama County, Iowa. In any event, we are in agreement with the district court that the resolution of this factual issue is not essential to our analysis.

[4] For a more detailed discussion of the history of the Tribe during this period, see Mr. Justice Holmes' discussion in *Sac and Fox Indians of the Mississippi in Iowa v. SAC and Fox Indians of the Mississippi in Oklahoma*, 220 U.S. 481, 482-90 (1911).

Indian agent held the title to an additional 280 acres as trustee for the benefit of the Tribe.

In 1896 Iowa tendered exclusive jurisdiction over the Tribe and their lands held in trust for them to the United States, with the following exception:

> Nothing contained in this act shall be so construed as to prevent on any of the lands referred to in this act the service of any judicial process issued by or returnable to any court of this state or judge thereof, or to prevent such courts from exercising jurisdiction of crimes against the laws of Iowa committed thereon either by said Indians or others, or of such crimes committed by said Indians in any part of this state * * *.

1894-1897 Iowa Laws ch. 110 (26th Extra Gen. Assembly). The United States accepted this tender, stating in part:

> That the United States hereby accepts and assumes jurisdiction over the Sac and Fox Indians of Tama County, in the State of Iowa, and of their lands in said State, as tendered to the United States by the act of the legislature of said State passed on the sixteenth day of January, eighteen hundred and ninety-six, subject to the limitations therein contained * * *.

Act of June 10, 1896, ch. 398, 29 Stat. 321, 331 (1897).

In 1937 the Tribe adopted a constitution and bylaws pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq. In 1948, Congress conferred concurrent criminal jurisdiction on the state over offenses committed "by or against Indians on the Sac and Fox Indian Reservation" located in Iowa. Act of June 30, 1948, ch. 759, 62 Stat. 1161.[5]

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[5] The Act of June 30, 1948, reads in pertinent part as follows: That jurisdiction is hereby conferred on the State of Iowa over offenses committed by or against Indians on the Sac and

Finally in 1967, the Iowa Legislature acted to assume civil jurisdiction over actions involving Indians arising "within the Sac and Fox Indian settlement in Tama county" to the extent that such jurisdiction was available under the federal Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 589. *See* Iowa Code § 1.12.

II.

The starting point for our analysis is the question of whether the land in Tama County presently occupied by the Tribe is a reservation. Both the Tribe and the United States contend it is, while the state of Iowa strenuously argues to the contrary.

As previously stated, in the Treaty of Oct. 11, 1842, the Sac and Fox Tribe ceded all its land west of the Mississippi River (which includes the Tama tract) to the United States and agreed to move to a reservation located in what is presently the state of Kansas. In this regard the language of the treaty is unequivocal:

> The confederated tribes of Sacs and Foxes cede to the United States, forever, all the lands west of the Mississippi river, to which they have any claim or title, or in which they have any interest whatever * * *.

Treaty of Oct. 11, 1842, 7 Stat. 596 (1846). It is clear from the treaty language that at least by 1845, when the Sac and

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Fox Indian Reservation in that State to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of any Indian reservation: *Provided, however,* That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

This court has recently interpreted this statute in *Youngbear v. Brewer*, 549 F.2d 74 (8th Cir. 1977), as preserving exclusive federal jurisdiction over offenses defined in 18 U.S.C. § 1153 (Federal Major Crimes Act), and as granting the state of Iowa jurisdiction over all other offenses.

Fox were required to be moved from the ceded land, no reservation existed in Iowa.

It is equally clear, however, that as early as 1865 the United States began to treat the Tama tract occupied by the Tribe as a de facto reservation. *Cf. Mattz* v. *Arnett*, 412 U.S. 481, 490 (1973). For example, in 1865 the federal government sent a special Indian agent to Tama and established a special agency for the Tribe, which continues to the present date. In the Act of Mar. 2, 1867, the United States approved the payment of the 1842 treaty annuities to the Tribe in Iowa. Furthermore, in the Treaty of Oct. 14, 1868, the tribal members living in Iowa were explicitly excepted from the requirement of rejoining the full Sac and Fox Tribe. From at least 1874, the Bureau of Indian Affairs expended money for the education of members of the Tribe, including the construction of a boarding school in Toledo, Iowa. These early actions by the federal government demonstrate that the United States recognized the Tribe in Iowa and dealt with them comparably to the Sac and Fox located on the Kansas reservation.

Any doubt was eliminated by the federal government in 1896, when the United States accepted and assumed "jurisdiction over the Sac and Fox Indians of Tama County" and their land. Act of June 10, 1896, ch. 398, 29 Stat. 321, 331 (1897). As one court stated in 1901:

> [I]t must be held that the Indians residing in Tama county are tribal Indians residing on lands purchased for their benefit with the consent of the state, which lands constitute a reservation under the control of the United States as in all matters pertaining to the domestic relations of the Indians, and, furthermore, that their status as tribal Indians is not based upon the act of the general assembly of Iowa just cited, but grows out of the fact that they are a part of the confederated tribes of Sacs and Foxes, between whom and the national government the relation of wards or dependents had been recognized and existed long before

> the state of Iowa was organized, and which condition of dependency has never been changed by any act of the national government.

Peters v. Malin, 111 F. 244, 251 (C.C.N.D. Iowa 1901).

Since 1897, the Bureau of Indian Affairs has expended funds for the Tribe in the areas of social services, land management, employment assistance, health services, including water and sanitation, police services, and education.

Finally, in the Act of June 30, 1948, Congress specifically referred to the Tama tract when it spoke of "offenses committed by or against Indians *on the Sac and Fox Indian Reservation* * * *." (Emphasis added.)

The state argues that the Tama tract cannot be a reservation since no specific treaty, statute or executive order has created a reservation. However, as stated years ago by the Supreme Court:

> [I]n order to create a reservation it is not necessary that there should be a formal cessation or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.

Minnesota v. Hitchcock, 185 U.S. 373, 390 (1902). *See United States v. White*, 508 F.2d 453, 456-57 (8th Cir. 1974). Thus, we are persuaded that the land located in Tama County and occupied by the Tribe constitutes an Indian reservation.[6]

[6] The district court held below that the tract is "Indian Country" within the meaning of 18 U.S.C. § 1151. The Iowa Supreme Court has also held the tract to be "Indian Country" in light of its finding that this land was set apart for the use and occupancy of Indians. *State v. Youngbear*, 229 N.W.2d 728, 732 (Iowa), *cert. denied*, 423 U.S. 1018 (1975). As discussed later in this opinion, we are persuaded that whatever label is placed on the tract, the relevant inquiry must still focus on the applicable treaties and statutes.

III.

The resolution of the "reservation" question, however, does not terminate this court's inquiry. In our opinion we must further look to the applicable treaties and statutes to determine the limit of the state's power on the Tama reservation.

A state has initial authority to regulate the taking of fish and game by reason of its police power. *Geer v. Connecticut*, 161 U.S. 519 (1896). The federal government, however, may preempt state control over fish and game by executing a valid treaty. *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924); *Missouri v. Holland*, 252 U.S. 416, 432 (1920). "Consequently, the state may enact and enforce no statute or regulation in conflict with treaties in force between the United States and the Indian nations." *United States v. State of Washington*, 520 F.2d 676, 684 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). In the instant case the issue is whether the federal government, through treaties and statutes, has preempted Iowa's regulation of the Tribe's hunting, fishing and trapping on the Tama reservation.

It is important to note at the outset that the relevant treaties and statutes are to be read with the tradition of Indian sovereignty in mind. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973). The Indian sovereignty doctrine can be traced to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832), where Mr. Chief Justice Marshall stated the following vis-a-vis Georgia's power over the Cherokee nation:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.

Several decades later the Indian sovereignty doctrine with its concomitant jurisdictional limit on the reach of state law was articulated by the Supreme Court as follows:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

United States v. Kagama, 118 U.S. 375, 384-85 (1886).

The Indian sovereignty doctrine, however, has not remained static over the years. As Mr. Justice White stated:

> Generalizations on this subject have become particularly treacherous. The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia*, 6 Pet. 515, 556-561 (1832), has given way to more individualized treatment of particular treaties and specific federal statutes * * * as they, taken together, affect the respective rights of States, Indians, and the Federal Government.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). *See Organized Village of Kake v. Egan*, 369 U.S. 60, 71-76 (1962). The doctrine's evolution was further described in another case by Mr. Justice Marshall, as follows:

> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. * * * The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. Compare, e.g., *United States v. Kagama*, 118 U.S. 375 (1886), with *Kennerly v. District Court*, 400 U.S. 423 (1971).

McClanahan v. Arizona State Tax Comm'n, supra, 411 U.S. at 172 (footnotes omitted).

In turning to the treaties and statutes before us, it must be remembered that although we have earlier stated that the Tama tract is in fact a reservation, we so held because of the various actions taken by the federal government in relation to the Tribe. It is abundantly clear that the reservation was not created by a specific treaty. Therefore, some of the maxims to be applied in the interpretation of treaties with Indian tribes are generally inapplicable here.[7]

As stated earlier, the Treaty of Oct. 11, 1842, is unequivocal in that the confederated tribes of Sacs and Foxes ceded to the United States all the lands west of the Mississippi River in which they had any claim or title or interest. The treaty further called for the complete relocation of the confederated tribes to a reservation in what is now the state of Kansas. We are persuaded that by this treaty the con-

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[7] For example, treaties with the Indians must be interpreted as they would have understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938). Doubtful expressions are to be resolved in favor of the Indians. *Oliphant v. Suquamish Indian Tribe*, No. 76-5729, slip op. at 16 n.17 (U.S. March 6, 1978); *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 392 (1976); *McClanahan v. Arizona State Tax Comm'n, supra*, 411 U.S. at 174; *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). Finally, treaties are to be construed "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942). *See also Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). It is also true that some of these maxims are applied in the interpretation of federal statutes. *See Antoine v. Washington*, 420 U.S. 194, 199 (1975). In the instant case we have applied the pertinent interpretive maxims to the congressional actions in question.

federated tribes relinquished their aboriginal rights to hunt and fish on the present Tama reservation.

The United States contends, however, that the Tribe's hunting, fishing and trapping rights were necessarily rejuvenated as a result of the subsequent creation of the Tama reservation. Congressional actions following the 1842 treaty convince us otherwise. For example, in 1867 Congress approved the payment of the 1842 treaty annuities to the Tribe "so long as they are peaceful and have the assent of the government of Iowa to reside in that State." Act of Mar. 2, 1867, ch. 173, 14 Stat. 492, 507 (1868). Although the scope of Iowa's control and jurisdiction over the Tribe are not clear from this language, it is apparent that at least in 1867 Congress contemplated some control by Iowa over the Tribe.

It is important that in 1896 Iowa tendered exclusive jurisover the Tribe and their lands to the United States with the proviso that "[n]othing contained in this Act shall be so construed as * * * to prevent such [Iowa] court from exercising jurisdiction of crimes against the laws of Iowa committed [on the Tribe's land] * * *." 1894-1897 Iowa Laws ch. 110 (26th Extra Gen. Assembly). The federal government accepted this tender of jurisdiction pursuant to the act of the Iowa legislature "subject to the limitations therein contained." Act of June 10, 1896, ch. 398, 29 Stat. 321, 331 (1897). In construing these two acts, a federal court has stated:

> [A]s it was clearly contemplated that these Indians would continue to reside as a tribe upon their lands in Tama county, and would be brought in some respects into contact with the people of Iowa, it was deemed wise and proper to reserve, for the protection of the latter, jurisdiction in certain particulars over the lands of the reservation, and jurisdiction to punish crimes against the people of Iowa; and these are the purposes of section 3 of the act, which reserves to the state * * *

> jurisdiction in the courts of the state over crimes against the laws of Iowa committed on the reservation by Indians * * *.
>
> * * *
>
> The state of Iowa has the right to exercise its police power for the protection of its own citizens, but it cannot regulate the affairs of the tribal Indians in their relations to each other, for in these relations the Indians are under the control and protection of the national government.

Peters v. Malin, supra, 111 F. at 253-54, 255.

A fair reading of the two acts leads us to the conclusion that in 1896 Congress consented to Iowa's jurisdiction over crimes committed on the Tama tract by members of the Tribe. Although the United States argues that violation of state fish and game laws are "victimless" crime at most, we are constrained to find that nevertheless they are still crimes.[8]

Finally, we are convinced that this court's recent decision in *Youngbear v. Brewer, supra,* supports our holding in the instant case. In *Youngbear,* we affirmed the lower court's decision[9] that in the Act of June 30, 1948, Congress granted jurisdiction generally to the state of Iowa over crimes committed by or against Indians on the Tama reservation, with the exception of those crimes listed in 18 U.S.C. § 1153 (Federal Major Crimes Act). As to those crimes, the federal courts retained exclusive jurisdiction. Because a violation of Iowa's fish and game laws does not fall within the exception noted above, it follows that Congress has recognized Iowa's jurisdiction to enforce its fish and game laws on the Tama reservation.

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[8] Violations of the Iowa fish and game laws can result, upon conviction or a plea of guilty, in a $100 fine or 30 days in jail. *See* Iowa Code §§ 109.32, 109.119.

[9] *See Youngbear v. Brewer,* 415 F. Supp. 807 (N.D. Iowa 1976).

The Tribe argues that *Menominee Tribe of Indians v. United States,* 391 U.S. 404 (1968), requires that statutes affecting jurisdiction over reservation Indians must specifically address hunting, fishing and trapping rights before they are affected. In that case the Supreme Court held that the Menominee Tribe was granted a reservation in Wisconsin by the Treaty of Wolf River in 1854, which included hunting and fishing rights. The Court further held that these rights were not extinguished by the Menominee Indian Termination Act of 1954, 68 Stat. 250, as amended, 25 U.S.C. §§ 891-902, even though the purpose of this Act was to end all federal supervision of the tribe and to substitute in its place state jurisdiction. The Court so held because of another statute passed by the same Congress, Public Law 280, 67 Stat. 588, as amended, 18 U.S.C. § 1162, which provided that: "Nothing in this section * * * shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute *with respect to hunting, trapping, or fishing* or the control, licensing, or regulation thereof." (Emphasis added.)

In the instant case Congress did not specifically exempt the Tribe's hunting, fishing and trapping rights from state jurisdiction as it did in respect to all Indian country within the state of Wisconsin in 18 U.S.C. § 1162. To the contrary, Congress, in the Act of June 30, 1948, has given the state of Iowa jurisdiction over crimes committed by Indians on the Tama reservation with the exception of the major crimes listed in 18 U.S.C. § 1153. As the Supreme Court's conclusion in *Menominee* was based largely on 18 U.S.C. § 1162,[10] we do not find *Menominee* controlling.

In summary, we are persuaded that the federal government has created through its various actions, with the

[10] *See Kimball v. Callahan,* 493 F.2d 564, 567-69 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974).

statutory consent and cooperation of the state of Iowa, a de facto reservation in Tama County, Iowa. The resolution of this issue, however, does not end our inquiry, for a state's power on a reservation is determined by the applicable treaties and statutes. Our reading of the 1842 treaty convinces us that the Tribe yielded up its aboriginal rights to hunt, fish and trap on the land. Furthermore, by statute, Congress acceded to Iowa's statutory withholding of jurisdiction over all crimes against the state, except those enumerated in the Federal Major Crimes Act. By its legislative actions, we are persuaded that Congress has recognized the state of Iowa's jurisdiction to enforce its fish and game laws on the reservation.

It is important to note that our decision today does not prevent the tribal members from hunting, fishing and trapping on the reservation. The tribal members, like other Iowa landowners, may in general hunt on their own land without purchasing a license, subject to laws governing seasons and limits. We only hold that the state may enforce its fish and game laws on the reservation in the same manner in which it enforces Iowa's fish and game laws against any Iowa landowner.

Accordingly, we affirm the judgment of the district court.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

(Caption Omitted in Printing)

Order Denying Rehearing

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

June 7, 1978

Act of the Sixth Iowa General Assembly, c. 30, July 15, 1856

Section 1. Consent of the state given—for Sacs and Foxes, to reside in the state—annuities. That the consent of the state is hereby given that the Indians now residing in Tama county known as a portion of the Sacs and Foxes, be permitted to remain and reside in said state, and that the governor be requested to inform the secretary of war thereof, and urge on said department, the propriety of paying said Indians their proportion of the annuities due or to become due to said tribe of Sacs and Fox Indians.

Sec. 2. Census—list filed. That the sheriff of said county, shall as soon as a copy of this law is filed in the office of the county court proceed to take the census of said Indians now residing there giving their names, and sex, which said list shall be filed and recorded in said office, the persons whose names are included in said list shall have the privileges granted under this act, but none others shall be considered as embraced within the provision of said act.

Sec. 3. Take effect. This act shall take effect from and after its publication in the Iowa Capital Reporter and Iowa Capital Reporter and Iowa City Republican published at Iowa City.

Act of the Twenty Sixth Iowa General Assembly, c. 110, Feb. 14, 1896

United States to have the jurisdiction of lands owned by Indians.

Section 1. That, except as hereinafter provided, exclusive jurisdiction of the Sac and Fox Indians residing in Iowa and retaining the tribal relation, and of all other Indians dwelling with them, and of all lands now or hereafter owned by or held in trust for them as a tribe, be and the same is hereby tendered to the United States, and that, as soon as the United States shall accept and assume such jurisdiction, all such jurisdiction on the part of the state of Iowa shall cease.

United States may purchase lands for schools.

Sec. 2. Consent is hereby given to the United States to purchase any land in Tama county to be used for and in connection with any school or schools to be established and managed by federal authority for the education of said Indians.

Courts may exercise jurisdiction in criminal cases.

Sec. 3. Nothing contained in this act shall be so construed as to prevent on any of the lands referred to in this act the service of any judicial process issued by or returnable to any court of this state or judge thereof, or to prevent such courts from exercising jurisdiction of crimes against the laws of Iowa committed thereon either by said Indians or others, or of such crimes committed by said Indians in any part of this state or to prevent the establishment and maintenance of highways and the exercise of the right of eminent domain under the laws of this state over lands now or hereafter owned by or held in trust for said Indians, or to prevent the taxation of said lands for state, county, bridge, county road, and district road purposes, and such

other purposes as the general assembly may from time to time by special statute provide.

Lands may be taxed.

SEC. 4. This act being of immediate importance shall take effect from and after its publication in the Iowa State Register and the Des Moines Leader, newspapers printed and published in Des Moines, Iowa.

Approved Feb. 14th, 1806.

Act of June 10, 1896, c. 398, 29 Stat. 321, 331

That the United States hereby accepts and assumes jurisdiction over the Sac and Fox Indians of Tama County, in the State of Iowa, and of their lands in said State, as tendered to the United States by the act of the legislature of said State passed on the sixteenth day of January, eighteen hundred and ninety-six, subject to the limitations therein contained; and the United States Indian agent of the Sac and Fox Agency, Iowa, and the governor of the State of Iowa, respectively, are hereby authorized to transfer by deed of conveyance, for the use and benefit of said Indians, the legal title held by them in trust, respectively, and the trusteeship of the lands of the Sac and Fox Indians of Tama County, Iowa, to the Secretary of the Interior and his successors in office.

Act of June 30, 1948, ch. 759, 62 Stat. 1161

AN ACT

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservation in that State to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of any Indian reservation: *Provided, however,* That nothing contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

Approved June 30, 1948.

Supreme Court, U. S.
FILED
SEP 28 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-356

SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA,

Petitioner,

vs.

LES LICKLIDER, Chairman, Iowa State Conservation Commission; THOMAS A. BATES; JIM D. BIXLER; JOHN G. LINK; CAROLYN T. LUMBARD; HERBERT T. REED; and JOHN THOMPSON, members of the State Conservation Commission; FRED A. PRIEWERT, Executive Director, State Conservation Commission; and KENNETH KAKAC, Superintendent of Law Enforcement, Hunting and Fishing,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND CONDITIONAL PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the District Court is not reported; the Court of Appeals decision is reported at 576 F. 2d 145 (8th Cir. 1978).

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QUESTIONS PRESENTED FOR REVIEW

Whether Iowa ever ceded jurisdiction over hunting and fishing on the Tama Indian Settlement.

———o———

STATEMENT OF THE CASE

The Respondents would modify the petitioner's statement of the facts of this case in the following respects.

1. Respondents do not accept as a matter of fact that some members of the Sac and Fox tribe remained in Iowa following the 1842 treaty.[1] The Eighth Circuit noted that neither they nor the district court considered resolution of that issue essential to the determination of the case (Footnote 3, Appendix to Petitioner's Brief, p. 9A, 10A). Respondents never conceded that such a remnant population existed and continue to assert that none in fact did.

2. It remains at issue whether the federal Indian agent who held the 280 acres of land in trust did so by authorization of Congress or the Bureau of Indian Affairs.

3. Respondents have at all times held that the Tama Settlement is not a "reservation". Respondents will fully treat this issue in the argument of this brief.

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1 Treaty of October 11, 1842, 7 Stat. 596.

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REASONS FOR NOT GRANTING THE PETITION FOR WRIT OF CERTIORARI

The conclusion of the Court below was correct.

The treaties between the tribe and the United States, the actions of the United States Congress and the actions of the Iowa Legislature evidence jurisdiction of the State of Iowa over hunting and fishing on the Tama Indian Settlement.

Of the numerous transactions between the United States, the Sac and Fox Tribe and Iowa, there are three critical events that determine the resolution of this case. The first is the Treaty of October 11, 1842, 7 Stat. 596. By that treaty, the confederated tribes agreed to cede all Iowa lands to the United States and remove to the Kansas territory. The Eighth Circuit correctly held that by said treaty, the tribes relinquished aboriginal rights of hunting and fishing. *Cf.,* F. Cohen, *Handbook of Federal Indian Law,* pp. 311-312 (U. N. Mex. Press ed. 1971).

Second, in 1896 Iowa tendered exclusive jurisdiction over the Tribe and the lands held in trust for them to the United States, with the following exception:

> Nothing contained in this act shall be so construed as to prevent on any of the lands referred to in this act the service of any judicial process issued by or returnable to any court of this state or judge thereof, or to prevent such courts from exercising jurisdiction of crimes against the laws of Iowa committed thereon either by said Indians or others, or of such crimes committed by said Indians in any part of this state * * *.

Acts of the 26th Iowa General Assembly, ch. 110, February 14, 1896. The United States accepted this tender, stating in part:

> That the United States hereby accepts and assumes jurisdiction over the Sac and Fox Indians of Tama County, in the State of Iowa, and of their lands in said State, as tendered to the United States by the act of the legislature of said State passed on the sixteenth day of January, eighteen hundred and ninety-six, subject to the limitations therein contained * * *.

Act of June 10, 1896, ch. 398, 29 Stat. 321, 331.

Third, in 1948, Congress conferred concurrent criminal jurisdiction on the state over offenses committed "by or against Indians on the Sac and Fox Indian Reservation" located in Iowa. Act of June 30, 1948, ch. 759, 62 Stat. 1161.

As indicated above, the 1842 Treaty terminated the aboriginal rights of the tribe in Iowa. The Eighth Circuit went on to correctly hold that these rights were never rejuvenated by subsequent events. The Petitioner's argument fails to establish that they ever were.

Petitioner contends that since 1865, the settlement area has been treated like any other Indian Reservation. Closer examination reveals that such is not the case. In 1867, Congress approved of paying annuities arising under the 1842 Treaty to the Tama Indians. That approval was qualified by Congress:

> . . . so long as they are peaceful and have the assent of the government of Iowa to reside in the state.

Act of March 2, 1867, ch. 173, 14 Stat. 492, 507 (1868).

Such a qualification is totally inconsistent with federal control of Indian Reservations and Indian aboriginal freedom.

The Petitioner contends that the tender of exclusive jurisdiction over the Sac and Fox Tribe and the land held in trust for the tribe by Iowa in 1896[2] and the acceptance of that tender and its conditions by Congress[3] did not confer hunting and fishing jurisdiction in Iowa. Petitioner's Brief, p. 6. The facts fail to show that Iowa ever lost jurisdiction over hunting and fishing and enforcement of her laws on land held by her governor between 1842 and 1896, thus not requiring anything to be conferred on Iowa at that time. As the Iowa Legislative Act was worded to be an exclusive tender, if the state desired to retain any jurisdiction, it was necessary to reserve it. That was done by general language retaining jurisdiction over crimes against the laws of Iowa and such language was accepted by Congress. Violations of Iowa's game laws are criminal acts which can result in a fine or imprisonment. Iowa Code, 1977, § 109.32, § 109.119. By the plain wording of the legislative and Congressional actions in 1896, Iowa has jurisdiction to regulate hunting and fishing on the Tama tract.

Petitioner relies heavily upon a line of cases arising at the turn of the century which involved attempts by the Indian agent to enforce state compulsory school attendance laws.[4] Petitioner misconstrues the holding of *Peters*

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2 Act of the 26th G. A., ch. 110, February 14, 1896.

3 Act of June 10, 1896, ch. 398, 29 Stat. 321, 331.

4 *In re Lelah-Puc-Ka-Chee*, 98 F. 429 (N. D. Iowa 1899); *Peters v. Malin*, 104 F. 849 (N. D. Iowa 1900); *Y-Ta-Tah-Wah v. Rebock*, 105 F. 257 (N. D. Iowa 1900); *Peters v. Malin*, 111 F. 244 (N. D. Iowa 1901).

v. Malin, 111 F. 244 (N. D. Iowa 1901) in stating that the case held that Iowa had nothing to reserve. That case states, *supra* at 255:

> The State of Iowa has the right to exercise its police powers for the protection of its own citizens, but it cannot regulate the affairs of tribal Indians in their relations to each other, . . .

Nothing in the *Peters* case, *supra,* denies Iowa's jurisdiction herein.

Petitioner's argument that the 1948 statute did not confer jurisdiction fails for the same reasons. In *Youngbear v. Brewer,* 549 F. 2d 74 (8th Cir. 1977), the court held that Congress granted general jurisdiction to Iowa over crimes committed by or against Indians on the Tama tract, but excepted the ten major crimes defined by 18 U. S. C. § 1153 for exclusive federal jurisdiction. Legislative history of the 1948 statute sheds some light on the reasons Congress was acting again in regard to jurisdiction of the Tama Indians. It seems that the *Peters v. Malin* case, *supra,* had caused confusion as to the scope of Iowa's jurisdiction, at least as to those crimes by Indians against other Indians. A letter from Mr. Peyton Ford, then assistant to the Attorney General of the United States, indicates that the need for the 1948 bill was due to a breakdown in law enforcement on the Tama Settlement. H. R. Rep. No. 2536 at 3, 80th Cong., 2d Sess. (1948). In relevant part, it states:

> . . . [T]he State of Iowa by Act of February 14, 1896 (Iowa laws 1896-97, p. 114), ceded exclusive jurisdiction to the United States over the Indians and the lands included in the Sac and Fox Indian Reservation, but reserved jurisdiction in section 3 of the act over crimes against the laws of Iowa committed on the reservation by Indians and others. This cession of jurisdiction was accepted by Congress by the act of June 10, 1896 (29 Stat. 331). In construing this act of cession, the case of Peters v. Malin (111 Fed. 244), held that the reservation of jurisdiction set forth in section 3 did not subject such Indians to the criminal laws of the States, except for offenses committed against white persons, nor did it reserve to the State any jurisdiction or control over the domestic affairs or relations of the Indians. While there may be some question as to whether a State cession statute can limit Federal jurisdiction over tribal Indians, it appears clear that the jurisdiction of offenses committed by Indians against other Indians on the Sac and Fox Indian Reservation is in the Federal and not the State court.

It cannot be said that the two actions by Congress are contradictory under the circumstances.

Petitioner makes several attempts to show that Iowa jurisdiction over hunting and fishing is improper. Iowa is not subject to the confines of Public Law 280, 67 Stat. 588, as amended, 18 U. S. C. § 1162 which was applicable in the case of *Menominee Tribe of Indians v. United States,* 391 U. S. 404 (1968). Also, *Youngbear v. Brewer, supra,* did not specifically deal with 18 U. S. C. §§ 1164, 1165. Petitioner's contention that a dichotomy of federal jurisdiction over non-Indians and state jurisdiction over Indians who violate these sections misreads the purpose of statutes designed to protect Indian possessory rights. It was held in *Donahue v. California Justice Court for Klamath Trinity Judicial Dist.,* 93 Cal. Rptr. 310, 15 C. A. 3d 557 (1971), *cert. denied,* 404 U. S. 909 (1971), that California was not prohibited by past or present federal law from applying its fish and game laws to non-tribal In-

dians or others who went on Indian Reservation without authorization.

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CONDITIONAL PETITION FOR WRIT OF CERTIORARI

Respondent respectfully petitions the Court that if Petitioner's writ is granted, this conditional writ be granted Petitioner to consider all issues involved in the case including whether the Tama Settlement area is a "Reservation".

The Eighth Circuit held that while the Tama Settlement was not expressly designated a reservation, the manner in which the federal government dealt with the area caused the creation of a "de facto" reservation. Petitioner's Brief, p. 13a. This concept is in direct conflict with established principles of Indian law. 42 C. J. S. *Indians* § 29 reads:

> An Indian reservation is a part of the public domain set apart by proper authority for the use and occupation of a tribe or tribes of Indians. It may be set apart by an act of Congress, by treaty, or by executive order, but it cannot be custom or prescription.

The case of *Sioux Tribe of Indians v. United States,* 94 Ct. Cl. 150, 170, aff'd 316 U. S. 317 (1942) states:

> There are three kinds of Indian Reservations: those which were created by treaties previous to 1871; those which have been created by acts of Congress since 1871; and those made by Executive Orders whereby the President has set apart public lands for use of the Indians in order to keep them within a certain territory.

There has been no such formal dedication of the Tama Settlement.

The Eighth Circuit relied upon *Minnesota v. Hitchcock,* 185 U. S. 373, 390 (1902) to hold that no formal action is necessary to create a reservation. Based upon the relations between the United States and the Sac and Fox Tribe, the Eighth Circuit concluded that a de facto reservation existed.

Respondent requests that the Court examine these apparent conflicting decisions if they grant the Petitioner's petition for writ of certiorari.

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CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied. Alternatively, if the Petition is granted, the Court should grant Respondents' Conditional Petition for Writ of Certiorari to consider the issue of whether the Tama Settlement is a reservation.

Respectfully submitted,

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